84-119

NO._____

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHARLES MOORE,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR CERTIORARI - CRIMINAL CASE

ROBERT E. RICHARDSON, JR.
Attorney at Law
118 S. Crockett
Sherman, Texas 75090
Telephone 214/893-7541
ATTORNEY FOR PETITIONER

JIM BOB DARNELL
Criminal District Attorney
P.O. Box 10536
Lubbock, Texas 79408
Telephone 806/741-8043
ATTORNEY FOR RESPONDENT

40 pp

QUESTION PRESENTED

Did the Texas Court of Appeals err and violate the rights to due process and of a fair trial after determining that the Petitioner had been convicted of three crimes and assessed three separate punishments of 5, 3 and 3 years respectively for only one criminal offense by arbitrarily selecting the longest punishment assessed by a prejudiced jury and reforming the judgment in such a manner.

LIST OF PARTIES

The following is a list of parties to the proceedings:

1. Charles Moore
2. State of Texas

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES MOORE,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR CERTIORARI - CRIMINAL CASE

OPINION BELOW

The opinion of the Texas Court of Appeals below (Appendix A, infra, p.12) has yet to be reported. A petition for discretionary review was refused by the Texas Court of Criminal Appeals. (Appendix B, infra, p.23).

JURISDICTION

The opinion of the Court below (Appendix A, Page 12) was entered on November 30, 1983. Petitioner's petition for discretionary review was refused by the Texas Court of Criminal Appeals on May 9, 1984. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 USC §1264(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The 5th Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subjected to the same offense to be twice put in jepardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

2. The 6th Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

3. The 14th Amendment, Section 1, United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. Course of Proceedings

The facts necessary to place in their setting the questions now raised can be briefly stated:

On August 3, 1981, in a cause then pending in the 237th District Court of Lubbock County, entitled the State of Texas v. Charles Moore, Petitioner was found guilty by a jury on an indictment of three counts of theft.

On August 28, 1983, the District Court entered judgment and Peititoner was to serve five years, three years, and three years respectively for the three counts. This judgment and sentence was reformed by the Court of Appeals for the Seventh Supreme Judicial District,___ 2d __ (not yet reported). The Court of Appeals held that there was only one criminal offense committed and reformed the judgdment to show one

conviction and selected the five year term as the one Petitioner is to serve. Petitioner had purchased several items and paid for them with a check that had insufficient funds. Rather than try for one offense of theft, the State attempted to convict and punish Petitioner for each individual article purchased. The jury was lead to believe that three different crimes had been committed and punished accordingly. The Court of Appeals reformed this judgment but in so doing chose the longest sentence imposed by the jury as the one Petitioner is to serve.

On January 27, 1984, Petitioner filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. On May 9, 1984, this Petition was refused.

B. Relevant facts concerning the underlying convictions for theft.

The offenses alleged against Petitioner arose out of his participation as a buyer at an auction of farm machinery and equipment in Lubbock County, Texas. Petitioner was the successful bidder on seventy-five of the auctioned items. For sixty-eight of the items - including a tractor, a water tank, and a tank trailer - he gave a check for $7,861.00 The check was deposited but it was returned unpaid marked "N.S.F." (Appendix A.).

An indictment was returned alleging, in three counts, that Petitioner had committed the offenses of felony theft of three separate items of personal property. Petitioner was subsequently convicted of these three offenses.

EXISTENCE OF JURISDICTION

Petitioner's rights to due process and against double jeopardy were violated by the Appellate court since it arbitrarily selected the highest sentence from three convictions after determining that Petitioner should have only been convicted of one offense.

The case in question began when Petitioner was indicted in one indictment charging him with stealing three separate and distinct items. He was tried for three separate offenses; the jury was charged in the guilt phase of trial on three separate thefts; the jury was charged to find and return three separate punishments, which it did.

However, the law in Texas is well settled that in multiple count indictments arising from a single transaction the state may allege two or more of the offenses arising out of the transaction in separate counts of the same indictment, but a conviction may be had on only one of these counts. Crocker v. State of Texas, 573 SW2d 190, 197 (Tex. Cr. App. 1978).

However, this rule in Texas has an adjoining caveat. Namely, if multiple counts from a single transaction are tried by the State, the court may either order the State to elect to proceed only on one or instruct the jury that a conviction can be had only upon one. Crocker v. State of Texas, 573 SW2d 190, 197. As the Texas Court of Appeals correctly noted, the trial court failed to do either of these. Instead, the trial court submitted all three counts unconditionally and the jury returned the verdict of guilty on each count, following which the jury assessed Defendant's punishment at respectively five years, three years, and three years.

The Court of Appeals recognized that the trial court erred but instead of reversing the case simply chose the five year sentence as the one defendant has to serve. As authority, the Court of Appeals cited the case of Beaupre vs. State of Texas, 526 SW2d 811,816 (Tex.Cr.App.1975), Cert.denied 423 US 1037, 96 Sup.Ct. 227, 46 L. Ed.2d 147 (1975). However,

the reading of Beaupre shows that the situation presented in that case is distinguishable from the present In Beaupre the defendant was charged in a single indictment with rape and rape of a child. The jury was not instructed as required in Crocker. The Jury found the defendant guilty of both crimes and assessed punishment for each at not less than five years nor more than 25 years for each count. In Beaupre the court noted that it was error for the defendant to be convicted of two counts. However, since the punishment for both was assessed the same at not less than five years nor more than twenty-five by the Jury the Appellete Court simply reformed the judgment. Even assuming this was constitutional, the present situation is far different. Here, there were different punishments assessed at five, three, and three years respectfully. The Court of Appeals in reversing the Judgment are the arbitrarily chose the longest punishment. Such action

is clearly violative of appellant's Fifth and Fourteenth Amendment rights of the United States Constitution.

However, even if Appellant's Fifth and Fourteenth Amendment rights have not been violated, his Sixth Amendment rights have. When the Court of Appeals selected the sentence in question, they chose from three sentences set by a prejudiced jury. By charging the appellate with three separate offenses, it was made to appear to these jurors that they were in fact dealing with the Defendant who had committed multiple theft and was involved in a crime spree. There is undeniable that there is a great deal of difference in the impression made on the average jury between a person who has been accused of commiting one crime and one who has been accused of commiting several separate crimes. Any juror will react more prejudicially against multiple crimes than against single crimes.

The sixth amendment guarantees the accused the right to a fair trial. A fair trial is one conducted before impartial and unprejudiced jurors. See Farese vs. U.S., 428 F2d 178 (5th Cir.1970 Therefore, by prejudicing the jury with its multiple count charge and praying that the appellate had engaged in a crime spree, appellete was denied a fair trial. Furthermore, the jury set sentences for the multiple count offenses in this prejudiced attitude. Therefore, when the Court of Appeals made a choice from the three sentences, it chose from a prejudicially set list.

CONCLUSION

The judgment below is directly contrary and violative of the 5th, 6th and 14th Amendments of the United States Constitution.

The decision by the Texas Court of Appeals to reform the judgment against petitioner and to assess punishment at five years was arbitrary and comprecious. This petition for writ of certiorari should therefore be granted.

Respectfully submitted,

LAW OFFICES OF ROBERT E. RICHARDSON, JR.

BY: Robert E. Richardson, Jr.
Robert E. Richardson, Jr.
118 S. Crockett Street
Sherman, Texas 75090
Telephone 214/893-7541

ATTORNEYS FOR PETITIONER

This is to certify that a true and correct copy of the foregoing document was mailed to all attorneys of record in accordance with the Rules, this 5th day of July, 1984

Robert E. Richardson, Jr.

NO. 07-82-0054-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH SUPEREME JUDICIAL DISTRICT

OF TEXAS, AT AMARILLO

PANEL D

NOVEMBER 30, 1983

CHARLES MOORE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT OF LUBBOCK COUNTY;

237TH JUDICIAL DISTRICT; NO. 22,476;

HONORABLE ROBERT C. WRIGHT, JUDGE

Before REYNOLDS, C.J.,

and DODSON and COUNTISS, JJ.

In a prosecution for offenses conceived to arise out of a criminal episode, a jury convicted appellant Charles Moore of the three offenses of felony theft alleged in three counts in a single indictment. The jury assessed appellant's punishment at confinement for, respectively, five years, three years and three years.

Appellant seeks a reversal on seven grounds of error. The material contentions are narrowed for clarity and stated in the order of resolution thusly: this Court lacks jurisdiction over the appeal; the trial court erred in failing to quash the indictment; the evidence is insufficient to show the intent to commit theft; appeallant was erroneously charged and tried on three counts of theft in the absence of an evidenced criminal episode; and he was placed in double jeopardy.

We conclude that this Court is vested with jurisdiction over the appeal and that, although a criminal episode supporting convictions for the three offenses of theft alleged was not shown, a conviction for the first-count offense of theft is supported by the indictment and proof without placing appellant in double jeopardy. We, therefore, reform the judgment and sentence and, as reformed, affirm.

Appellant gave notice of appeal from his convictions on 28 August 1981 to the Court of Criminal Appeals, which then was vested with appellate jurisdiction of all criminal cases. Tex. Const. art V, § 5 (Vernon 1955). The appellate record was transmitted from the trial court and filed in this Court on 26 February 1982.

Challenging, with his fifth ground of error, the jurisdiction of this Court to entertain his appeal, appellant contends that since his 28 August 1981 notice of appeal was given to the Court of Criminal Appeals then having jurisdiction of all appeals in criminal cases, he "had an absolute right to have his appeal heard by the highest criminal court of Texas " The premise underlying the contention of the absolute right is these statements: "The change in the law, effective September 1, 1981, allowing Courts of Appeal to hear criminal appeals was equivalent to an ex post facto law and deprived the Appellant of due process of law;" and "When a statute alters the rules of evidence it is unconstitutional to apply it a ex post facto." We are not in accord.

The change in the law to which appellant directs attention has reference to the constitutional amendments and statutory enactments respecting the appellate jurisdiction of the Court of Criminal Appeals and the courts of appeals on and after 1 September 1981. One of the constitutional amendments mandates that jurisdiction of appeals of all cases in which the death penalty has been assessed is vested in the Court of Criminal Appeals, which has final appellate jurisdiction, and the jurisdiciton of appeals in all other criminal cases is vested in the "courts of appeals as prescribed by law." Tex. Const. art. V, § 5 (Vernon Supp. 1982-1983). Another constitutional amendment authorized the Legislature to divide the State into supreme judicial districts and establish a court of appeals in each district with appellate jurisdiction "under such restrictions and regulations as may be prescribed by law." Tex. Const. art. V, § 6 (Vernon Supp. 1982-1983).

Acting upon the constitutional direction, the Legislature, after dividing the State into supreme judicial districts and establishing a court of appeals in each, Tex. Rev. Civ. Stat Ann. arts. 198, 1817 (Vernon Supp. 1982-1983), addressed the matter of jurisdiction of those courts in criminal appeals by prescribing that the courts "shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed." Tex. Code Crim. Proc. Ann. art. 4.03 (Vernon Supp. 1982-1983). The Legislature further prescribed that appeals to the courts of appeals filed on or after 1 September 1981 shall be filed in the court of appeals having jurisdiction, and provided for the transfer of a limited number of appeals then pending in the Court of Criminal Appeals to the various courts of appeals. Act of June 8, 1981, ch. 291, § 149, 1981 Tex.Gen. & Spec. Laws 820. In implementation thereof, the Court

of Criminal Appeals ordered, on 24 July 1981, that the "appellate records in criminal cases to be filed in an appellate court on or after September 1, 1981, regardless of when notice of appeal was given, shall be filed in the appropriate Court of Appeals, except for those cases in which the Constitution and the statutes specifically provide the appeal will be directly to the Court of Criminal Appeals..."

By the constitutional and statutory scheme for appeals in criminal cases, the State merely exercised its discretion, as it may, to provide for diversity in appellate jurisdiction. Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist., 281 U.S. 74, 81, 50 S.Ct. 228, 74 L.Ed. 710 (1930). Obviously and contrary to appellant's premise, the appellate scheme does not constitute an ex post facto law which, in the classical sense, "aggravates a crime or makes

it greater than when it was committed or similarly changes and inflicts greater punishment than that which was proscribed when the crime was committed." See Betancourt v. State, 590 S.W.2d 487, 489 (Tex.Cr.App. 1979), cert. denied, 446 U.S. 942, 100 S.Ct. 2166, 64 L.Ed.2d 796 (1980). And, aside from the reality that a rule of evidence is not involved in a question of jurisdiction, there is no deprivation of constitutional due process where, as under the appellate scheme provided in this State, all appellants have an equal right in like cases to resort to the appellate courts for redress. Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist., supra. The fifth ground of error is overruled.

The offenses alleged against appellant arose out of his participation as a buyer at an auction of farm machinery and equipment in Lubbock County. Travis Butler, who had contracted with the owner of the farm properties

to sell them, conducted the auction. Appellant was the successful bidder on seventy-five of the auctioned items. For sixty-eight of the items--including a Ferguson tractor and loader, a water tank, and a tank trailer--he gave Butler a check for $7,861. Butler deposited the check for payment, but it was returned to him unpaid, stamped "N.S.F." After being unable to contact appellant personally, Butler sent a registered letter addressed to appellant at the address shown on appellant's check. The letter was returned to Butler, marked "unclaimed."

An indictment was returned alleging, in three counts, that appellant had committed the offenses of felony theft of three separate items of personal property. By the first count of the indictment, it was alleged that appellant did

> intentionally and knowingly appropriate property, to-wit: acquire property other than real property, unlawfully, to-wit: one (1) Ferguson tractor and loader of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00) from Travis Butler, without the effective consent, to-wit: induced by deception, of the owner, Travis Butler, to-wit: person who had greater right to possession of said property than the Defendant, and with intent to deprive the said owner of said property, ...

Similar language was contained in the second and third counts of the indictment to allege respectively the felony theft of a water tank and a tank trailer.

Appellant attacks the sufficiency of the indictment with his fourth ground of error, under which he contends the court erred in overruling his motion to quash the indictment because of its confusing nature. He faults the indictment since, in his view, it does not meet the statutory standard for sufficiency. See Tex. Code Crim. Proc. Ann. art. 21.11 (Vernon 1966). The insufficiency occurs because, he argues, with four "to-wits" in each count, a person of common understanding would be lost.

Although the indictment counts are inartfully drawn--see, e.g., 7 S. Willson, Criminal Forms Ann. § 12.01, et seq. (Texas Practice 1977); 2 Branch's Texas Annotated Penal Statutes With Forms § 31.03 (3d ed. 1974) -each count alleges that (1) appellant (2) with intent to deprive the owner of the property (3) appropriated the described property (4) without the named owner's effective consent. The allegations of these elements charged the offense of theft. Tex. Penal Code Ann., §31.03(a)(b)(1) (Vernon Supp. 1982-1983); Hughes v. State, 561 S.W.2d 8, 10 (Tex.Cr.App. 1978). In our view, the "to-wits" were inserted to impart a certainty to the counts as drawn; but, if they offend, they may be eliminated as surplusage without detriment to the indictment, because they are not descriptive of that which is legally essential to charge the crime.

Smallwood v. State, 607 S.W.2d 911, 912 (Tex.Cr.App. 1980). In any event we conclude that the language is sufficiently intelligible to a person of common understanding to adequately give the accused notice of the offense charged and enable him to prepare his defense. Accord, Terry v. State, 517 S.W.2d 554, 556 (Tex.Cr.App. 1975).

With an accompanying argument, appellant submits there is record evidence that he purchased two tank trailers at the auction and, therefore, the indictment did not set out specifically enough the items taken. However, in his motion to quash the indictment, appellant did not include a lack of specificity of the items taken as a reason to quash the indictment; hence, we need not entertain and

answer the argument. American Plan Food Corporation v. State, 508 S.W.2d 598, 604 (Tex.Cr.App. 1974). Nevertheless, we notice that the descriptions of the items taken are sufficient when tested by a motion to quash, Wood v. State, 632 S.W.2d 734, 736-37 (Tex.Cr.App. 1982), and we observe that a variance between the allegation and proof does not vitiate the indictment. Seiffert v. State, 501 S.W.2d 124, 126 (Tex.Cr.App. 1973). The fourth ground is overruled.

By his third ground of error, appellant challenges the sufficiency of the evidence to show his intent to commit theft. The insufficiency results, he argues, because the evidence shows that when his $7,861 check was presented to the bank for payment, he had a balance of $3,885.71 on deposit, which was ample to pay for the tractor and loader, the water tank and the tank trailer that were value at, respectively, $2,000, $650 and $475 by the testimony. The challenge is unsupported by any authority, and it is not credible.

Where, as in this cause, one obtains property by issuing a check for the payment of money when he does not have sufficient funds on deposit with the bank for "the payment in full of the check," his intent to commit theft is presumed if he does not pay the holder in full within ten days after receiving notice that payment was refused by the bank. Tex. Penal Code Ann. § 31.06(a)(2) (Vernon 1974). Appellant has not questioned the proof that he acquired the described property by issuing his check for it, that he did not have sufficient funds on deposit with the bank to pay the check in full, that he had notice the check was dishonored by the bank, and that he did not pay the holder of the check in full after notification of its dishonor.

Thus, the presumption of intent to commit theft by deception was alleged in the

indictment rests upon sufficient evidence. Gawlik v. State, 608 SW.2d 671, 672-73 (Tex.Cr.App. 1980). The force of the evidence of intent is not dented by the evidence that appellant had on deposit funds exceeding the testimonial value of the property charged to have been appropriated; the funds were not sufficient to pay the check in full and full payment was not made after notification that payment was refused by the bank. Accord, Ratcliff v. State, 504 S.W.2d 883, 884-86 (Tex.Cr.App. 19794), cert. denied, 423 U.S. 910, 96 S.Ct. 573, 46 L Ed.2d 412 (1975). The third ground is overruled.

With his first ground of error, appellant contends that the court erred in allowing him to be charged and tried on three counts of theft since there was no evidence of a criminal episode. The State defends the

charge and trial, insisting that the offenses charged arose out of a criminal episode, i.e., "the repeated commission of any one offense [against property]." See Tex. Penal Code Ann. § 3.01 (Vernon 1974). Therefore, the State says, the joinder of and prosecution for those offenses in a single trial is sanctioned by § 3.02(a) of the Penal Code, the State being permitted to include all of the offenses in one indictment with each offense stated in a separate count. Tex. Code Crim. Proc. Ann. art. 21.24(a) (Vernon Supp. 1982-1983).

The statutory sanction for the joinder and prosecution of offenses arising out of a criminal episode applies to separate and distinct offenses against property, each complete within itself, which are committed during a continuing course of conduct. Tex. Penal Code § 3.01 (Vernon 1974). See Gordon v. State, 633 S.W.2d 872 (Tex.Cr.App. 1982);

Garcia v. State, 574 S.W.2d 133 (Tex.Cr.App. 1978). However, where, as here, the alleged offenses against property result at the same time from one transaction and require the same, common fact for the completion of each offence alleged, only one offense is committed. See, e.g., Koah v. State, 604 S.W.2d156 (Tex.Cr.App. 1980). In that event, the State may allege in one count all of the property appropriated in the transaction and, upon proper proof, secure one conviction, Pena v State, 422 S.W.2d 937, 939-40 (Tex.Cr.App. 1968); or the State may allege two or more of the offenses arising out of the transaction in separate counts of the same indictment, but a conviction can be had upon only one of the counts. Crocker v. State, 537 S.W.2d 190, 197 (Tex.Cr.App. 1978).

In the present cause, the court, upon submission of all three counts to the jury in the absence of the State's election of a count to proceed on., should have instructed the jury that a conviction can be had on only one of the counts. Id. The court did not do so; instead, the court submitted all three counts unconditionally and the jury returned a verdict of guilty on each count, following which the jury assessed appellant's punishment at, respectively, five years, three years and three years. The court rendered judgments on the verdicts and pronounced sentences accordingly, incorporating the judgments in one judgment instrument and the sentences in another sentence instrument. Notwithstanding that appellant could be convicted on only one count, Ex parte Easley 490 S.W.2d 570, 571 (Tex.Cr.App.1972), the multiple convictions and sentences do not void the proceedings; the judgment and sentence may be reformed to show a proper conviction and sentence. Beaupre v. State, 526 S.W.2d 811, 816 (Tex.Cr.App. 1975), cert. denied, 423 U.S. 1037, 96 S.Ct. 227, 46 L.Ed.2d 147 (1975).

The record shows that the court submitted, and instructed the jury to consider whether appellant was guilty or not guilty of, the offenses alleged in numerical order of the counts in the indictment. The court also submitted the punishment issues, and the jury fixed the punishments, in the same order. It follows that since the conviction for theft of the Ferguson tractor and loader as alleged in the first count of the indictment was returned first, the trial court was without legal authority to render judgment and pronounce sentence on the verdicts for the second and third counts in the indictment. Ex parte Easley, supra. Therefore, since the conviction for theft as alleged in the first count of the indictment is supported by the evidence, the only challenge to which has been overruled, the conviction may be affirmed, and the later two convictions may be reversed and their prosecutions dismissed. Price v. State, 475 S.W.2d 742, 743-44 (Tex.Cr.App. 1972).

Consequently, it is ordered that: the judgment is reformed to show that appellant is guilty of the single offense of theft of property of the value of $200.00 or more but less than $10,000 as charged in Count I of the indictment; the sentence is reformed to show that appellant was found guilty of the single offense of theft of property of the value of $200.00 or more but less than $10,000, and that he is sentenced to confinement in the Texas Department of Corrections for an indeterminate term [under the indeterminate sentence law then in effect] of not less than two years nor more than five years. Beaupre v. State, supra. The recitations in the judgment and sentence that appellant was found guilty of theft as charged in Counts II and III in the indictment and sentenced to confinement for respective indeterminate terms of not less than two years nor more than three years are deleted, id., those convictions are reversed, and their prosecutions are ordered dismissed. Price v. State, supra, at 744.

To this extent, appellant's first ground of error is sustained; in all other respects, it is overruled. The reversals and ordered dismissals of prosecutions moot appellant's sixth and seventh grounds of error by which he contends his conviction of theft of a tank trailer as charged in Count III in the indictment should be reversed for lack of sufficient evidence.

With his second, an remaining, ground of error, appellant contends that the rendering of judgment on the three counts of theft placd him in double jeopardy prohibited by the Federal and State Constitutions. The same contention was made in a similar situation and overruled in Jones v. State, 482 S.W.2d 194 (Tex.Cr.App. 1972), cert. denied, 410 U.S. 932, 93 S.Ct. 1377, 35 L.Ed.2d 594 (1973). Adhering to the rule in Jones, we overrule the second ground of error.

As reformed, the judgment is affirmed.

Charles L. Reynolds
Chief Justice

Publish. Tex.Cr.App.R. 207(a).

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0134-84
STYLE: Moore, Charles

May 9, 1984

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

RT OF CRIMINAL APPEALS
BOX 12308, CAPITAL STATION
TIN, TEXAS 78711

MAIL TO:

Jim D. Lovett
P. O. Box 904
Clarksville, TX 75426

BEST AVAILABLE COPY

STATE OF TEXAS

COUNTY OF GRAYSON,

I, Robert E. Richardson, do swear that the Petition for Writ of Certiorari filed on behalf of Charles Moore was deposited in a United States Post Office, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court, Washington, D.C. This Petition for Writ of Certiorari was filed within the permitted time period.

Robert E. Richardson, Jr.
Robert E. Richardson

5th SUBSCRIBED AND SWORN to before me this day of July, 1984.

Lucille Lollar
Notary Public in and for
The State of Texas

84-119

NO. _____

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHARLES MOORE,
PETITIONER,

VS.

THE STATE OF TEXAS,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS-TEXAS

BRIEF FOR RESPONDENT

JIM BOB DARNELL
CRIMINAL DISTRICT ATTORNEY
FOR LUBBOCK COUNTY, TEXAS
STATE BAR NO. 05391275

BY: HOLLIS M. BROWNING
ASSISTANT CRIMINAL DISTRICT
ATTORNEY FOR LUBBOCK
COUNTY, TEXAS
STATE BAR NO. 03222500
P.O. BOX 10536
LUBBOCK, TEXAS 79408

ATTORNEY FOR RESPONDENT

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BEST AVAILABLE COPY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHARLES MOORE,
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CRIMINAL DISTRICT ATTORNEY
FOR LUBBOCK COUNTY, TEXAS
STATE BAR NO. 05391275

BY: HOLLIS M. BROWNING
ASSISTANT CRIMINAL DISTRICT
ATTORNEY FOR LUBBOCK
COUNTY, TEXAS
STATE BAR NO. 03222500
P.O. BOX 10536
LUBBOCK, TEXAS 79408

ATTORNEY FOR RESPONDENT

QUESTION PRESENTED

Did the Texas Court of Appeals deprive the petitioner of his Constitutional rights to due process and fair trial, after determining that the petitioner had been convicted on three counts and assessed three separate punishments of 5, 3, and 3 years respectively for only one criminal offense, by selecting the punishment first rendered by the jury and reforming the judgment in like manner?

LIST OF PARTIES

The following is a list of the parties in this proceeding:

1. Charles Moore, Petitioner

2. State of Texas, Respondent

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CONSTITUTIONAL PROVISIONS

1. United States Constitution, Amendment 5. vi

2. United States Constitution, Amendment 6. vi

3. United States Constitution, Amendment 14. vii

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment 5:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

3. United States Constitution, Amendment 14:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES/RULES INVOLVED

1. U.S. Sup. Ct. Rule 17, 28 U.S.C.:

Considerations Governing Review on Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered.

(a). When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the subject matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b). When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c). When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decision of the Court.

2. U.S. Sup.Ct. Rule 21(e) (iv), 28. U.S.C.:

The Petition for Certiorari

.1(e). A concise statement of the grounds on which the jurisdiction of this Court is involved showing:

(iv). The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

3. 28 U.S.C. Sec. 1257(3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3). By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilge or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

STATEMENT OF THE CASE

I. Factual Background

On September 29, 1979, the petitioner in this case attended an auction in Lubbock County, Texas where he successfully bid on several items.

On that same day petitioner wrote a check as payment for the items on which he bid. The check was returned for insufficient funds and several attempts at restitution proved unsuccessful.

Only three of the items were involved in this action. In the State's indictment the items were listed in the following order: a Ferguson tractor and loader valued at $2,000, a water tank valued at $650., and a tank trailer valued at $475. (appendix C, p. 23).

II. Procedural Background

At trial, on August 3, 1981, the jury found petitioner guilty on all three counts of theft, deliberating on each count individually, in the same order

they were listed in the indictment.

Judgment was entered on August 28, 1981 and the petitioner was sentenced to five years, three years and three years respectively, again in the same order of the counts in the indictment.

The Court of Appeals found that only one offense was committed and, in an opinion delivered on November 30, 1983, reformed the judgment to reflect the state of the law in Texas. The reformation consisted of affirming the first conviction (for five years) and dismissing the remaining two convictions. (Appendix A, infra., p. 11).

The Texas Court of Criminal Appeals refused Petitions for Discretionary Review on the part of petitioner and the State on May 9, 1984. (Appendix B, infra., p. 22).

I

It is clear that the Petitioner's asserted basis for jurisdiction on this petition for writ of certiorari is erroneous. Petitioner cites a jurisdictional statute at 28 U.S.C. Sec. 1264(1). No such statute exists. The jurisdictional statute governing writs of certiorari can be found at 28 U.S.C. Sec. 1257(3) which reads, in relevant part:

> Final judgments or decrees rendered by the court of the state..., may be reviewed by the Supreme Court as follows,
>
> (3) By writ of certiorari,...where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Petitioner has asserted violations of three constitutional rights. First, he argues that his rights to due process under the Fifth and Fourteenth Amendments to the Constitution have been

violated by the appellate court action and the Court of Criminal Appeals denial of discretionary review. It is, no doubt, a federal question to assert a violation of Constitutional rights, but Petitioner points to no concrete instance where such a denial took place. It is easy to assert constitutional violations if one is not obliged to prove them.

Petitioner's other ground of jurisdiction, a violation of the Sixth Amendment's guarantee of a fair trial, must fail for similar reasons. His only argument is based of a prejudiced jury when there is no factual basis for such a statement.

In any event, petititioner's case is not one falling within the usual parameters of a proper cases for certiorari under U.S. Sup. Ct. Rule 17, 28 U.S.C.

Supreme Court Rule 17.1 (b) does not apply because the petitioner has not shown any conflicting state court of last resort of a conflicting federal

court of appeals decision. Supreme Court Rule 17.1(c) does not apply for two reasons. First, there is no question of federal law which should be settled by the Supreme Court. Second, there is no decision in conflict with any prior Supreme Court case.

The State recognizes that Rule 17 is not intended to be exhaustive, but only to serve as a guideline. However, petitioner's case so misses the mark that to grant certiorari would disarm the Rule and mitigate its effectiveness as a screening device on frivious petitions for writ of certiorari.

Because petitioner has not adequately shown jurisdiction as required by U.S. Sup. Ct. Rule 21(e) (iv), 28 U.S.C., his petition should be denied.

II

In the alternative, should proper jurisdiction be found, the State has ample authority to support its actions.

The petitioner correctly cites Crocker v. State of Texas, 573 S.W.2d 190, 197 (Tex.Cr. App. 1978), where the court outlined two courses of action for the treatment of a multiple count indictment arising from a single transaction. The State may allege an unlimited number of offenses arising out of the transaction in separate counts on the same indictment, but may only seek conviciton on one of them. However, the court in Crocker, supra, at 197, allowed another course of action which effectively circumvents the petitioner's argument of a violation of his Sixth Amendment right to a fair trial. It is also permissible for the State to submit each count to the jury along with an instruction stating that a conviction can only be had

on one of them.

Far from supporting petitioner's case, the Crocker decision weakens it in a vital area. Since Texas case law allows a multiple count indictment to go to the jury, the fact that this happened in the instant case could not have caused any undue prejudice. Petitioner argues that his sentence may have been more stringent because the multiple count indictment was seen by the jury when the only case he cites allows that very thing to happen in the normal course of a trial. It seems more plausible that the jury would be disposed toward leniency since they were handing down three sentences instead of one.

III

The appellate court actions in dismissing the second and third convictions and letting the initial conviction stand is also supported by Texas case law.

In Beaupre v. State of Texas, 526 S.W.2d 811 (Tex.Cr.App. 1975), the court allowed a similar reformation of judgment when the defendant in that case was convicted on two counts arising from the same transaction. The court simply dismissed the second count conviction and allowed the first count to stand.

In Ex parte Easley, 490 S.W.2d 570 (Tex.Cr.App. 1972), the judgment was reformed by dismissing the second count conviction when the defendant was tried and convicted of incest and rape. The rape conviction was dismissed on a habeas corpus petition because the rape conviction and sentence were second in time at trial.

The same sort of reformation was also used in Price v. State of Texas, 475 S.W.2d 742 (Tex.Cr.App 1972) and White v. State of Texas, 543 S.W.2d 130 (Tex.Cr.App. 1976).

The record in the present case clearly shows the order in which the convictions and sentences were had. The theft of the tractor was listed in the indictment first, decided first, and that sentence was imposed first. The appellate court dismissed the two subsequent convictions.

Far from acting arbitrarily, the appellate court strictly followed past case law and used logic to solve the problem. By the authority cited, their action was proper.

CONSLUSION

The judgment below is in accord with the state of the law in Texas and is not a violation of any constitutional right. Therefore, the Petition for Writ of Certiorari should be denied.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas respectfully prays the Honorable Supreme Court of the United States to deny Petitioner's application for Writ of Certiorari.

Respectfully submitted,
Jim Bob Darnell
Criminal District Attorney
for Lubbock County, Texas

By: Hollis M. Browning

Hollis M. Browning, Assistant
Criminal District Attorney
for Lubbock County, Texas
State Bar No. 03222500
P.O. Box 10536
Lubbock, Texas 79408
Telephone 806/741-8043

This is to certify that a true and correct copy of the foregoing document was mailed to all attorneys of record in accordance with the Rules,

This 6th day of August, 1984

Hollis M. Browning

NO. 07-82-0054-CR

IN THE COURT OF APPEALS

FOR THE SEVENTH SUPREME JUDICIAL DISTRICT

OF TEXAS, AT AMARILLO

PANEL D

NOVEMBER 30, 1983

CHARLES MOORE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT OF LUBBOCK COUNTY; 237TH JUDICIAL DISTRICT; NO. 22,476; HONORABLE ROBERT C. WRIGHT, JUDGE

Before REYNOLDS, C.J., and DODSON and COUNTISS, JJ.

In a prosecution for offenses conceived to arise out of a criminal episode, a jury convicted appellant Charles Moore of the three offenses of felony theft alleged in three counts in a single indictment. The jury assessed appellant's punishment at confinement for, respectively, five years, three years and three years.

Appellant seeks a reversal on seven grounds of error. The material contentions are narrowed for clarity and stated in the order of resolution thusly: this Court lacks jurisdiction over the appeal; the trial court erred in failing to quash the indictment; the evidence is insufficient to show the

intent to commit theft; appellant was erroneously charged and tried on three counts of theft in the absence of an evidenced criminal episode; and he was placed in double jeopardy.

We conclude that this Court is vested with jurisdiction over the appeal and that, although a criminal episode supporting convictions for the three offenses of theft alleged was not shown, a conviction for the first-count offense of theft is supported by the indictment and proof without placing appellant in double jeopardy. We, therefore, reform the judgment and sentence and, as reformed, affirm.

Appellant gave notice of appeal from his convictions on 28 August 1981 to the Court of Criminal Appeals, which then was vested with appellate jurisdiction of all criminal cases. Tex. Const. art. V, § 5 (Vernon 1955). The appellate record was transmitted from the trial court and filed in this Court on 26 February 1982.

Challenging, with his fifth ground of error, the jurisdiction of this Court to entertain his appeal, appellant contends that since his 28 August 1981 notice of appeal was given to the Court of Criminal Appeals, then having jurisdiction of all appeals in criminal cases, he "had an absolute right to have his appeal heard by the highest criminal court of Texas." The premise underlying the contention of the absolute right is these statements: "The change in the law, effective September 1, 1981, allowing Courts of Appeal to hear criminal appeals was equivalent to an ex post facto law and deprived the Appellant of due process of law;" and "When a statute alters the rules of evidence it is unconstitutional to apply it as ex post facto." We are not in accord.

The change in the law to which appellant directs attention has reference to the constitutional amendments and statutory enactments respecting the appellate jurisdiction of the Court of Criminal Appeals and the courts of appeals on and after 1 September 1981. One of the constitutional amendments mandates that jurisdiction of appeals of all cases in which the death penalty has been assessed is vested in the Court of Criminal Appeals, which has final appellate jurisdiction, and the jurisdiction of appeals in all other criminal cases is vested in the "courts of appeals as prescribed by law." Tex. Const. art. V, § 5 (Vernon Supp. 1982-1983). Another constitutional amendment authorized the Legislature to divide the State into supreme judicial districts and establish a court of appeals in each district with appellate jurisdiction "under such restrictions and regulations as may be prescribed by law." Tex. Const. art. V, § 6 (Vernon Supp. 1982-1983).

Acting upon the constitutional direction, the Legislature, after dividing the State into supreme judicial districts and establishing a court of appeals in each, Tex. Rev. Civ. Stat. Ann. arts. 198, 1817 (Vernon Supp. 1982-1983), addressed the matter of jurisdiction of those courts in criminal appeals by prescribing that the courts "shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed." Tex. Code Crim. Proc. Ann. art. 4.03 (Vernon Supp. 1982-1983). The Legislature further prescribed that appeals to the courts of appeals filed on or after 1 September 1981 shall be filed in the court of appeals having jurisdiction, and provided for the transfer of a limited number of appeals then pending in the Court of Criminal Appeals to the various courts of appeals. Act of June 8, 1981, ch. 291, § 149, 1981 Tex. Gen. & Spec. Laws 820. In implementation

thereof, the Court of Criminal Appeals ordered, on 24 July 1981, that the "appellate records in criminal cases to be filed in an appellate court on or after September 1, 1981, regardless of when notice of appeal was given, shall be filed in the appropriate Court of Appeals, except for those cases in which the Constitution and the statutes specifically provide the appeal will be directly to the Court of Criminal Appeals . . . ."

By the constitutional and statutory scheme for appeals in criminal cases, the State merely exercised its discretion, as it may, to provide for diversity in appellate jurisdiction. Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist., 281 U.S. 74, 81, 50 S.Ct. 228, 74 L.Ed. 710 (1930). Obviously and contrary to appellant's premise, the appellate scheme does not constitute an ex post facto law which, in the classical sense, "aggravates a crime or makes it greater than when it was committed or similarly changes and inflicts greater punishment than that which was proscribed when the crime was committed." See Betancourt v. State, 590 S.W.2d 487, 489 (Tex.Cr.App. 1979), cert. denied, 446 U.S. 942, 100 S.Ct. 2166, 64 L.Ed.2d 796 (1980). And, aside from the reality that a rule of evidence is not involved in a question of jurisdiction, there is no deprivation of constitutional due process where, as under the appellate scheme provided in this State, all appellants have an equal right in like cases to resort to the appellate courts for redress. Ohio ex rel. Bryant v. Akron Metrop. Pk. Dist., supra. The fifth ground of error is overruled.

The offenses alleged against appellant arose out of his participation as a buyer at an auction of farm machinery and equipment in Lubbock County. Travis Butler, who had contracted with the owner of the farm properties to

sell them, conducted the auction. Appellant was the successful bidder on seventy-five of the auctioned items. For sixty-eight of the items—including a Ferguson tractor and loader, a water tank, and a tank trailer—he gave Butler a check for $7,861. Butler deposited the check for payment, but it was returned to him unpaid, stamped "N.S.F." After being unable to contact appellant personally, Butler sent a registered letter addressed to appellant at the address shown on appellant's check. The letter was returned to Butler, marked "unclaimed."

An indictment was returned alleging, in three counts, that appellant had committed the offenses of felony theft of three separate items of personal property. By the first count of the indictment, it was alleged that appellant did

> intentionally and knowingly appropriate property, to-wit: acquire property other than real property, unlawfully, to-wit: one (1) Ferguson tractor and loader of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00) from Travis Butler, without the effective consent, to-wit: induced by deception, of the owner, Travis Butler, to-wit: person who had greater right to possession of said property than the Defendant, and with intent to deprive the said owner of said property, ...

Similar language was contained in the second and third counts of the indictment to allege respectively the felony theft of a water tank and a tank trailer.

Appellant attacks the sufficiency of the indictment with his fourth ground of error, under which he contends the court erred in overruling his motion to quash the indictment because of its confusing nature. He faults the indictment since, in his view, it does not meet the statutory standard for sufficiency. See Tex. Code Crim. Proc. Ann. art. 21.11 (Vernon 1966).

The insufficiency occurs because, he argues, with four "to-wits" in each count, a person of common understanding would be lost.

Although the indictment counts are inartfully drawn--see, e.g., 7 S. Willson, Criminal Forms Ann. § 12.01, et seq. (Texas Practice 1977); 2 Branch's Texas Annotated Penal Statutes With Forms § 31.03 (3d ed. 1974)--each count alleges that (1) appellant (2) with intent to deprive the owner of the property (3) appropriated the described property (4) without the named owner's effective consent. The allegation of these elements charged the offense of theft. Tex. Penal Code Ann. § 31.03(a)(b)(1) (Vernon Supp. 1982-1983); Hughes v. State, 561 S.W.2d 8, 10 (Tex.Cr.App. 1978). In our view, the "to-wits" were inserted to impart a certainty to the counts as drawn; but, if they offend, they may be eliminated as surplusage without detriment to the indictment, because they are not descriptive of that which is legally essential to charge the crime. Smallwood v. State, 607 S.W.2d 911, 912 (Tex. Cr.App. 1980). In any event, we concude that the language is sufficiently intelligible to a person of common understanding to adequately give the accused notice of the offense charged and enable him to prepare his defense. Accord, Terry v. State, 517 S.W.2d 554, 556 (Tex.Cr.App. 1975).

With an accompanying argument, appellant submits there is record evidence that he purchased two tank trailers at the auction and, therefore, the indictment did not set out specifically enough the items taken. However, in his motion to quash the indictment, appellant did not include a lack of specificity of the items taken as a reason to quash the indictment; hence, we need not entertain and answer the argument. American Plan Food Corporation v. State, 508 S.W.2d 598, 604 (Tex.Cr.App. 1974). Nevertheless, we notice

that the descriptions of the items taken are sufficient when tested by a motion to quash, Wood v. State, 632 S.W.2d 734, 736-37 (Tex.Cr.App. 1982), and we observe that a variance between the allegation and proof does not vitiate the indictment. Seiffert v. State, 501 S.W.2d 124, 126 (Tex.Cr.App. 1973). The fourth ground is overruled.

By his third ground of error, appellant challenges the sufficiency of the evidence to show his intent to commit theft. The insufficiency results, he argues, because the evidence shows that when his $7,861 check was presented to the bank for payment, he had a balance of $3,885.71 on deposit, which was ample to pay for the tractor and loader, the water tank and the tank trailer that were valued at, respectively, $2,000, $650 and $475 by the testimony. The challenge is unsupported by any authority, and it is not credible.

Where, as in this cause, one obtains property by issuing a check for the payment of money when he does not have sufficient funds on deposit with the bank for "the payment in full of the check," his intent to commit theft is presumed if he does not pay the holder in full within ten days after receiving notice that payment was refused by the bank. Tex. Penal Code Ann. § 31.06(a)(2) (Vernon 1974). Appellant has not questioned the proof that he acquired the described property by issuing his check for it, that he did not have sufficient funds on deposit with the bank to pay the check in full, that he had notice the check was dishonored by the bank, and that he did not pay the holder of the check in full after notification of its dishonor.

Thus, the presumption of intent to commit theft by deception as alleged in the indictment rests upon sufficient evidence. Gawlik v. State, 608

S.W.2d 671, 672-73 (Tex.Cr.App. 1980). The force of the evidence of intent is not dented by the evidence that appellant had on deposit funds exceeding the testimonial value of the property charged to have been appropriated; the funds were not sufficient to pay the check in full and full payment was not made after notification that payment was refused by the bank. Accord, Ratcliff v. State, 504 S.W.2d 883, 884-86 (Tex.Cr.App. 1974), cert. denied, 423 U.S. 910, 96 S.Ct. 573, 46 L.Ed.2d 412 (1975). The third ground is overruled.

With his first ground of error, appellant contends that the court erred in allowing him to be charged and tried on three counts of theft since there was no evidence of a criminal episode. The State defends the charge and trial, insisting that the offenses charged arose out of a criminal episode, i.e., "the repeated commission of any one offense [against property]." See Tex. Penal Code Ann. § 3.01 (Vernon 1974). Therefore, the State says, the joinder of and prosecution for those offenses in a single trial is sanctioned by § 3.02(a) of the Penal Code, the State being permitted to include all of the offenses in one indictment with each offense stated in a separate count. Tex. Code Crim. Proc. Ann. art. 21.24(a) (Vernon Supp. 1982-1983).

The statutory sanction for the joinder and prosecution of offenses arising out of a criminal episode applies to separate and distinct offenses against property, each complete within itself, which are committed during a continuing course of conduct. Tex. Penal Code § 3.01 (Vernon 1974). See Gordon v. State, 633 S.W.2d 872 (Tex.Cr.App. 1982); Garcia v. State, 574 S.W.2d 133 (Tex.Cr.App. 1978). However, where, as here, the alleged offenses against property result at the same time from one transaction and require

the same, common fact for the completion of each offense alleged, only one offense is committed. See, e.g., Koah v. State, 604 S.W.2d 156 (Tex.Cr. App. 1980). In that event, the State may allege in one count all of the property appropriated in the transaction and, upon proper proof, secure one conviction, Pena v. State, 422 S.W.2d 937, 939-40 (Tex.Cr.App. 1968); or the State may allege two or more of the offenses arising out of the transaction in separate counts of the same indictment, but a conviction can be had upon only one of the counts. Crocker v. State, 573 S.W.2d 190, 197 (Tex.Cr.App. 1978).

In the present cause, the court, upon submission of all three counts to the jury in the absence of the State's election of a count to proceed on, should have instructed the jury that a conviction can be had on only one of the counts. Id. The court did not do so; instead, the court submitted all three counts unconditionally and the jury returned a verdict of guilty on each count, following which the jury assessed appellant's punishment at, respectively, five years, three years and three years. The court rendered judgments on the verdicts and pronounced sentences accordingly, incorporating the judgments in one judgment instrument and the sentences in another sentence instrument. Notwithstanding that appellant could be convicted on only one count, Ex parte Easley, 490 S.W.2d 570, 571 (Tex.Cr.App. 1972), the multiple convictions and sentences do not void the proceedings; the judgment and sentence may be reformed to show a proper conviction and sentence. Beaupre v. State, 526 S.W.2d 811, 816 (Tex.Cr.App. 1975), cert. denied, 423 U.S. 1037, 96 S.Ct. 227, 46 L.Ed.2d 147 (1975).

The record shows that the court submitted, and instructed the jury to consider whether appellant was guilty or not guilty of, the offenses alleged in numerical order of the counts in the indictment. The court also submitted the punishment issues, and the jury fixed the punishments, in the same order. It follows that since the conviction for theft of the Ferguson tractor and loader as alleged in the first count of the indictment was returned first, the trial court was without legal authority to render judgment and pronounce sentence on the verdicts for the second and third counts in the indictment. Ex parte Fasley, supra. Therefore, since the conviction for theft as alleged in the first count of the indictment is supported by the evidence, the only challenge to which has been overruled, the conviction may be affirmed, and the later two convictions may be reversed and their prosecutions dismissed. Price v. State, 475 S.W.2d 742, 743-44 (Tex.Cr.App. 1972).

Consequently, it is ordered that: the judgment is reformed to show that appellant is guilty of the single offense of theft of property of the value of $200 or more but less than $10,000 as charged in Count I of the indictment; the sentence is reformed to show that appellant was found guilty of the single offense of theft of property of the value of $200 or more but less than $10,000, and that he is sentenced to confinement in the Texas Department of Corrections for an indeterminate term [under the indeterminate sentence law then in effect] of not less than two years nor more than five years. Beaupre v. State, supra. The recitations in the judgment and sentence that appellant was found guilty of theft as charged in Counts II and III in the indictment and sentenced to confinement for respective indeterminate terms of not less than two years nor more than three years are deleted, id., those

convictions are reversed, and their prosecutions are ordered dismissed. Price v. State, supra, at 744.

To this extent, appellant's first ground of error is sustained; in all other respects, it is overruled. The reversals and ordered dismissals of prosecutions moot appellant's sixth and seventh grounds of error by which he contends his conviction for theft of a tank trailer as charged in Count III in the indictment should be reversed for lack of sufficient evidence.

With his second, and remaining, ground of error, appellant contends that the rendering of judgment on the three counts of theft placed him in double jeopardy prohibited by the Federal and State Constitutions. The same contention was made in a similar situation and overruled in Jones v. State, 482 S.W.2d 194 (Tex.Cr.App. 1972), cert. denied, 410 U.S. 932, 93 S.Ct. 1377, 35 L.Ed.2d 594 (1973). Adhering to the rule in Jones, we overrule the second ground of error.

As reformed, the judgment is affirmed.

Charles L. Reynolds
Chief Justice

Publish. Tex.Cr.App.R. 207(a).

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0134-84
STYLE: Moore, Charles

May 9, 1984

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Jim Bob Darnell
Crim Dist Attorney
County Courthouse
Lubbock, TX 79401

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

RE: Case No. 0134-84
STYLE: Moore, Charles

May 9, 1984

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:

Jim Bob Darnell
Crim Dist Attorney
County Courthouse
Lubbock, TX 79401

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, duly selected, organized, sworn and impanelled as such for the County of Lubbock, State of Texas, at the January Term, A.D. 1981, of the District Court of the 237th Judicial District for said County, a Quorum thereof being present, upon their oaths present, in and to said Court, that on or about the 29th day of September, A.D. 1979, and anterior to the presentment of this indictment, in the County and State aforesaid, CHARLES MOORE did then and there

intentionally and knowingly appropriate property, to-wit: acquire property other than real property, unlawfully, to-wit: one (1) Ferguson tractor and loader of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00) from Travis Butler, without the effective consent, to-wit: induced by deception, of the owner, Travis Butler, to-wit: person who had greater right to possession of said property than the Defendant, and with intent to deprive the said owner of said property,

AND THE GRAND JURORS DO FURTHER PRESENT THAT the said CHARLES MOORE on or about the 29th day of September, A.D. 1979, in Lubbock County and State of Texas, did then and there intentionally and knowingly appropriate property, to-wit: acquire property other than real property, unlawfully, to-wit: one (1) water tank of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00) from Travis Butler, without the effective consent, to-wit: induced by deception, of the owner, Travis Butler, to-wit: person who had greater right to possession of said property than the Defendant, and with intent to deprive the said owner of said property,

AND THE GRAND JURORS DO FURTHER PRESENT THAT the said CHARLES MOORE on or about the 29th day of September, A.D. 1979, in Lubbock County and State of Texas, did then and there intentionally and knowingly appropriate property, to-wit: acquire property other than real property, unlawfully, to-wit: one (1) tank trailer of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00) from Travis Butler, without the effective consent, to-wit: induced by deception, of the owner, Travis Butler, to-wit: person who had greater right to possession of said property than the Defendant, and with intent to deprive the said owner of said property,

AND ALL of said amounts were obtained, as alleged, in one scheme and continuing course of conduct, and the aggregate amount of the amounts stolen was of the value of Two Hundred Dollars ($200.00) or more but less than Ten Thousand Dollars ($10,000.00),

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Foreman of the Grand Jury

Signed this 8th day of April, A.D. 1981.

BEST AVAILABLE COPY

STATE OF TEXAS

COUNTY OF LUBBOCK

I, Hollis M. Browning, do swear that the Cross-Petition for Writ of Certiorari on behalf of the State of Texas was deposited in a United States Post Office, with first class postage pre-paid, and properly addressed to the Clerk of the Supreme Court, Washington, D.C. This Cross-Petition for Writ of Certiorari was filed within the permitted time period.

Hollis M. Browning

Hollis M. Browning

SUBSCRIBED AND SWORN to before me this 6 day of October, 19 84.

Notary Public in and for the State of Texas 8-22-85